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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1618

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
A DELAWARE CORPORATION,
Petitioner,

VS.

RAYMOND KASSEL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS BRIEF IN OPPOSITION

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INDEX

	Page
Orders Below	1
Question Presented	2
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	6

TABLE OF AUTHORITIES

Cases

Consolidated Freightways v. *Kassel*, 612 F.2d 1064 (8th Cir. 1975)	2
Lynch v. *Household Finance Corp.*, 405 U.S. 538 (1972)	4
Poirier v. *Hodges*, 445 F.Supp. 838 (M.D. Fla. 1978)	5
Edwards v. *California*, 314 U.S. 160 (1971)	5
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	5

Constitutional Provisions

United States Constitution

Article I, section 8	3, 5
Fourteenth Amendment	4, 5

Statutes

42 U.S.C. § 1983	4, 5
42 U.S.C. § 1988	2, 3, 4, 5-6, 6
28 U.S.C. § 1920	2

Rules

Sup.Ct.R. 19(6)	3
Fed.R.App.P. 27	3
Fed.R.App.P. 39	3
8th Cir. R. 9, 14	3

Other Authority

1976 U.S. Code, Cong. and Ad. News 5908	6

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RESPONDENTS BRIEF IN OPPOSITION

Respondents, Raymond Kassel, et al., oppose the Petition for a Writ of Certiorari to review the order of the United States Court of Appeals for the Eighth Circuit entered in the above case on January 16, 1980.

ORDERS BELOW

The orders of January 16, 1980 and February 13, 1980, both deny Petitioners application for attorney fees and appear respectively in the appendix hereto, p. 5a and p. 13a, *infra*, and are not reported.

QUESTION PRESENTED

Whether a Court of Appeals may deny without opinion an application for attorney fees which fails to make a colorable showing of entitlement under 42 U.S.C. § 1988?

STATEMENT OF THE CASE

Following entry of judgment in its favor in the court below, *Consolidated Freightways* v. *Kassel*, 612 F.2d 1064 (8th Cir. 1975), Petitioner presented a bill for costs and disbursements including attorney fees to the Eighth Circuit Court of Appeals in total amount of $45,439.70. The procedural history of this claim is summarized below and set forth in the appendix hereto:

December 20, 1979—Petitioner sought a taxing of attorney fees for appellate work under 42 U.S.C. § 1988 plus costs under 28 U.S.C. § 1920. (App., *infra* at p. 1a).

January 2, 1980—Respondent filed its resistance to taxation of attorney fees under 42 U.S.C. § 1988. (App., *infra* at p. 3a)

January 16, 1980—Eighth Circuit Court of Appeals taxes $131.40 to respondent and denies petitioner's request for attorney fees. (App., *infra* at p. 5a)

January 25, 1980—Petitioner filed a "Motion to Vacate the Order of January 16," and Brief. (App., *infra* at p. 6a)

February 4, 1980—Respondent filed "Resistance to Appellee's Motion to Vacate" and Brief. (App., *infra* at p. 8a and p. 10a)

February 13, 1980—Petitioner's Motion to Vacate is denied by the Eighth Circuit Court of Appeals. (App., *infra* at p. 13a)

Petitioners now seek a Writ of Certiorari for review by this Court.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 19 sets forth Considerations Governing Review on Certiorari. Subsection (6) specifies the considerations relevant to review of a decision of a court of appeals. None of those considerations are present here.

Petitioner suggests neither a conflict in circuits nor a conflict with a decision of this Court. To Respondent's knowledge, no court has ever held that a court of appeals must hold an evidentiary hearing when confronted with an application for attorney fees connected with the appeal; nor has any court ever held that 42 U.S.C. § 1988 authorizes an award of attorney fees in a suit alleging an impermissible burden on interstate commerce in violation of Article I, § 8 of the Constitution. Petitioner does not and could not suggest that this case presents "an important question of federal law which has not been, but should be, settled by this Court." Rather, the apparent claim is that the court of appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."

It is anything but unusual for courts of appeal to deal summarily with applications and motions unrelated to the merits of the appeal. Neither Rule 27 nor Rule 39, Fed.R.App.P., contemplate hearings or elaboration by opinion as a matter of right. Indeed, Local Rules, Eighth Circuit Court of Appeals, contemplate disposition of the merits of appeals without reasoned elaboration. Rule 9 permits summary disposition of frivolous appeals without notice and without argument. Rule 14 permits affirmance without opinion for cases involving disposition of certain recurring issues when an opinion would have no precedential value. Thus, there is nothing particularly startling about an appellate court resolving a question

without reasoned elaboration. Petitioner is particularly ill-positioned to complain about the absence of a written opinion here. Petitioner's Bill of Costs simply stated, without elaboration, without supporting brief and without request for hearing, that the attorney fees were claimed pursuant to 42 U.S.C. § 1988. (App., *infra* at p. 1a). The order of the court rejecting attorney fees was no more lacking in reasoned elaboration than the application which preceded it. From all that was or has now been presented, it would appear that Petitioner's claim for attorney fees is essentially frivolous. Even if the argument were not completely frivolous, it was sufficiently unsupported that a summary rejection of the claim is scarcely so startling as to merit the exercise of this Court's supervisory jurisdiction.

Petitioner's substantive argument for entitlement to attorney fees under 42 U.S.C. § 1988 is contained in a brief footnote. *Petition for Writ of Certiorari* at 5, n. 3. Petitioner relies on language taken out of context from *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549, n. 16 (1972). In context, this Court in *Lynch* was making clear that 42 U.S.C. § 1983 would be construed broadly to encompass all individual constitutional rights guaranteed by the Fourteenth Amendment and would not be limited to so-called "personal" rights. But *Lynch* does not hold that § 1983 encompasses every constitutional claim. Indeed, *Lynch* repeats familiar doctrine:

> The broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of § 1 of the Civil Rights Act of 1871, 17 State 13, the direct lineal ancestor of §§ 1983 and 1343(3). Not only was § 1 of the 1871 Act derived from § 2 of the 1866 Act, but the 1871 Act was passed for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13.

It has never been suggested that claims under Article I provisions that expressly or impliedly restrict state power are "incorporated" into the Fourteenth Amendment. Because they are by their nature restrictions directly upon the states, the question of incorporation as per the Bill of Rights simply does not arise. *See Poirier* v. *Hodges*, 445 F.Supp. 838, 841-42 (M.D. Fla. 1978) (prohibition in Art. I, § 10 of the Constitution against impairing obligation of contract does not create a right redressable under 42 U.S.C. § 1983.)

The Commerce Clause not only does not fall within the ambit of the Fourteenth Amendment, properly understood it does not create a constitutional "right" in the sense that term is employed in 42 U.S.C. § 1983. A constitutional right in that sense is a direct protection from government for the individual. The Commerce Clause does not articulate a right against government.[1] Rather, it allocates authority between the state and national government. Individuals are permitted to challenge state regulations which allegedly burden or discriminate against interstate commerce, but they are seeking to vindicate the national interest in a competitive economy rather than the rights against government of an individual or a class.

Because this commerce clause was not a suit to remedy a deprivation of rights secured to a person by the Constitution within the meaning of 42 U.S.C. § 1983, petitioner was not entitled to attorney fees pursuant to 42

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[1] The so-called "right to travel" (more accurately labelled the right of interstate migration) has been grounded in the Commerce Clause. *See Edwards* v. *California*, 314 U.S. 160, 171 (1971). More recently this claim has been vindicated under the rubric of equal protection. *See, e.g., Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Wherever its conceptual home, the right to travel is not involved here.

U.S.C. § 1988.[2] This defect in petitioner's application was raised by respondent below and was doubtless the basis for its summary rejection by the Court of Appeals. Having still not mounted a colorable argument to the contrary, Petitioner can scarcely be heard to suggest that this Court should take the unusual step of invoking its supervisory authority.

CONCLUSION

For the reasons stated, Respondents request that a Writ of Certiorari be denied.

Respectfully submitted,

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[2] The legislative history of 42 U.S.C. § 1988, The Civil Rights Attorney's Fees Awards Act of 1976, indicates that its scope also relates to the enforcement of "civil rights" statutes in the Fourteenth Amendment sense of the term and nothing suggests that Commerce Clause cases are within its purview. *See, e.g.*, 1976 U.S. Code, Cong. and Ad. News 5908.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

BILL OF COSTS

This Honorable Court having affirmed the judgment of the Court below on December 7, 1979, Appellee requests the following taxation of costs against Appellants:

Costs under 28 U.S.C. § 1920		
Printing of Briefs and Motions, Motion to Vacate Stay, Brief in Opposition to Motion for Stay, Brief		$ 131.40
Costs under 42 USC § 1988		
Attorney's fees		41,911.00
Disbursements	3,528.70	
(Less printing costs requested under 28 USC § 1920 above)	(131.40)	3,397.30
		$45,439.70

Attached hereto and incorporated herein is an itemization and verification of the above fees and costs.

Dated at Madison, Wisconsin, this 20th day of December, 1979.

Respectfully submitted,

DEWITT, MCANDREWS & SUNDBY, S.C.

By: /s/ John H. Lederer
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

RESISTANCE TO APPELLEE'S BILL OF COSTS

COME NOW, Appellants, and make the following response to Appellee's submission of its Bill of Costs.

1. Under Rule 39, Rules of Appellate Procedure or as set out in Appellee's Request under 28 U.S.C. § 1920.

Appellants *agree* that $45.90 may be taxed as costs

6 copies of brief on Appeal (51 pgs. at $.15/pg)	$45.90

Appellants *object* to the taxing of:

6 copies of Motion to Vacate Stay (14 pgs. at $.15/pg)	$12.60
6 copies of Brief in Opposition to Motion for Stay (81 pgs. at $.15/pg)	$72.90

2. Appellants object to *any* allowance of attorney's fees to Appellee under Rule 39, Rules of Appellate Pro-

cedure or as set out in Appellee's Request under 42 U.S.C. § 1988.

WHEREFORE, Appellants respectfully submit that $45.90 be taxed as costs against Appellants and that all other costs, disbursements and attorney fees be denied.

IOWA DEPARTMENT OF TRANSPORTATION

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Attorney General of Iowa

ROBERT W. GOODWIN
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/s/ Lester A. Paff
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee,

vs.

RAYMOND KASSEL, ETC., *et al.*,
Appellants.

Appeal from the United States District Court
for the Southern District of Iowa

Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40, be taxed to appellants. Costs are collectible in the United States District Court for the Southern District of Iowa.

It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied.

January 16, 1980

A true copy
Attest:

/s/ Robert D. St. Vrain
Clerk,
U.S. Court of Appeals,
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

MOTION TO VACATE ORDER
of January 16, 1980

Appellee, Consolidated Freightways Corporation of Delaware [CF], respectfully moves the Honorable Court to vacate its order dated January 16, 1980, to the extent that it denies CF's motion to tax disbursements and attorneys' fees as costs and to remand to the District Court the question of CF's claim to attorneys' fees and disbursements under 42 USC § 1983 and § 1988. As grounds therefor, CF respectfully represents:

1. CF sought disbursements and attorneys' fees as taxed costs only because apparently required to do so to avoid waiver of the claim. CF assumed that the attorneys' fee question would be remanded to the trial court, which had severed the fee question under § 1983 and § 1988 from the case-on-the-merits, which was the only portion of the proceeding before this Court.

2. § 1983 and § 1988 are applicable.

3. The determination as to whether "special circumstances" warrant denial of attorneys' fees is particularly within the discretion of the trial court.

4. The trial court should be first permitted to determine whether this case presents "special circumstances" warranting denial of attorneys' fees.

5. If this Court is to rule on the question, CF should be permitted to file briefs and affidavits in support of its claim.

WHEREFORE, CF moves this Honorable Court to vacate its order dated January 16, 1980, and to remand to the District Court the question of CF's claim to attorneys' fees and disbursements, under 42 USC § 1983 and § 1988, or, in the alternative, to permit CF to file briefs and affidavits in support of its claim.

Dated at Madison, Wisconsin, this 25th day of January, 1980.

Respectfully submitted,

DEWITT, SUNDBY,
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

RESISTANCE TO APPELLEE'S MOTION TO VACATE ORDER OF JANUARY 16, 1980

COME NOW, Appellants, Raymond Kassel, et al., and in Resistance state:

1. The Appellee, Consolidated Freightways Corporation of Delaware [CF] have selected this forum for determination of attorneys' fees and disbursements under 42 USC § 1983 and § 1988 for appellate work.

2. That § 1983 and § 1988 are not applicable.

3. That the question of "special circumstance" need not be addressed.

WHEREFORE, Appellants, Raymond Kassel, et al ask this Court to dismiss CF's Motion to Vacate, tax costs to CF, and such other orders as this Court deems just.

DEPARTMENT OF TRANSPORTATION

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
Appellee.

BRIEF IN OPPOSITION OF MOTION TO VACATE ORDER OF JANUARY 16, 1980

This motion seeks to remand for determination by the trial court, this Court's determination that attorney fees and disbursements for CF's [plaintiff-below] appellate work is inappropriate. Principally, Appellee's Brief in Support of its Motion to Vacate is an argument that 42 USC § 1983 and, hence, 42 USC § 1988 are applicable.

The specific finding of the trial court is as follows:

> The Court is of the opinion that none of the pertinent regulations discriminate against interstate commerce. The Court is also of the opinion that CF did not establish unequal or improper enforcement of the law or regulation. Discriminating enforcement constituting a discrimination against interstate commerce was not proven. (Opinion—Stuart at page 14).

CF chose *not* to appeal this finding. CF chose *not* to ask the trial Court for an enlargement of findings of

fact and/or conclusions of law. Instead, CF having prevailed upon the principle contention that Iowa's length limitation with regard to double bottoms created an unconstitutional burden on interstate commerce, press their § 1983 claim under the guise of non-waiver. This position is without merit. The trial Court found no violation by state defendants giving rise to a § 1983 violation. Therefore, without a specific finding this Court properly determined that attorney fees in a commerce clause case are inappropriate.

CF's argument that rights arising out of the commerce clause are automatically within the ambit of § 1983 is not solace. The case here and below was not a "right to travel" case as CF now tries to characterize. The argument misconstrues the commerce clause which fundamentally allocates power between the federal government and states, whereas § 1983 and § 1988 deal with individual civil rights or those protected by the 14th Amendment and the Constitution. There is no case supporting CF's contention that attorney fees are appropriate in commerce clause cases. The narrow holding of *Raymond* v. *Rice* 434 U.S. 429 at 447

> Our holding is a narrow one, for we do not decide whether laws of other states restricting the operation of trucks over 55 feet long, or of double-trailer trucks, would be upheld if the evidence produced on the safety issue were not so overwhelmingly one-sided as in this case.

suggests that other states should be allowed to enforce their laws without the threat of unwarranted fees. Also, there is an absence of a statute enabling the award of attorney fees.

In sum, this Court's denial of an attorney fee and disbursement request is proper and the Order of January 16, 1980, should not be vacated.

DEPARTMENT OF TRANSPORTATION

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
Appellee,

v.

RAYMOND KASSEL ETC., *et al.*,
Appellants.

Appeal from the United States District Court
for the Southern District of Iowa

The Court has considered appellee's motion to vacate its order of January 16, 1980, and response thereto. It is now here ordered that appellee's motion be, and is hereby, denied.

February 13, 1980.